IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 391 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ISAR AHMED @ PAHELWAN NAZZIREAHMED SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 391 of 2002

MR YS LAKHANI FOR MR RJ GOSWAMI for Petitioner No. 1

MR SJ DAVE, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 10/05/2002

C.A.V. JUDGEMENT

This petition has been filed by the petitioner challenging the order of detention dated 3-8-2001 passed by the Police Commissioner, Ahmedabad City against the petitioner under the provisions of Sec.2(b) of the Gujarat Prevention of Anti-Social Activities Act, 1985

(`the PASA Act').

2. The short facts of the case are as under:

2.1 The petitioner was served with an order of detention under the PASA Act on 19-2-1999. However, said order was quashed by this Court vide order dated 24-4-1999 passed in Special Civil Application No.1913 of 199. Thereafter, second order of detention dated 19-7-1999 was passed against the petitioner which was also quashed by this Court vide order dated 19-10-2001 passed in Special Civil Application No.2300 of 2000 and when he was released from Jamnagar Jail, he was taken into custody in the third order of detention which was passed against him on 20-10-2000 and was detained in Porbandar Jail. However, third order of detention was revoked by the Advisory Board in December, 2000. Thereafter, fourth order of detention dated 3-8-2001 is being issued against the petitioner which is yet to be served on the petitioner and hence, this petition is filed at the pre-execution stage.

3. Initially, notice was issued by this Court (Coram: A.L.Dave,J.) vide order dated 18-1-2002. Thereafter, vide order dated 28-1-2002, draft amendment was allowed. On 11-2-2002 an affidavit-in-reply was filed by the learned AGP appearing at the relevant time on behalf of the respondent No.2 and matter was adjourned to 19-2-2002 at the request of Mr.Thakkar, learned advocate appearing for the petitioner. Thereafter, matter was adjourned from time to time and it has come before this Court on 19-3-2002. On 21-3-2002 also, learned advocate for the petitioner sought time and matter was adjourned to 28-3-2002. On 28-3-2002, since again a request was made by the learned advocate appearing for the petitioner for time, specific order was passed by this Court which reads as under:

> "Practically I have heard the matter and at the end of arguments, Ld. advocate Mr.Lakhani prayed for time. Therefore, I ahve heard him today again. Mr.Goswami prays for time. But the fact remains that the present petitioner is an absconder and pre-detention petition has been filed by him on 10-1-2002, for the reasons known to all concerned. Generally, pre-detention petitions are required to be heard day-to-day basis. The petitioner is delaying the matter and reasons for the same must be known to him. Just in order to give him last opportunity, S.O. to 1-4-2002."

Thereafter also, matter was adjourned from time to time. Today also, I have heard learned advocate for the petitioner and learned AGP for the State.

4. It is contended on behalf of the petitioner that though there was no illegal activities being carried out by the petitioner after the third order of detention dated 20-10-2000 was revoked by the Advisory Board, issuance of fourth order of detention dated 3-8-2001 is sought to be served on the petitioner. It is also contended by him that assuming without admitting that the petitioner was absconding in one offence registered in January, 2001, there is gross delay in execution as the same has been passed on 3-8-2001 and same has not been served on him till date and therefore, impugned order of detention at the pre-execution stage is required to be quashed. It is further contended that merely based on the statements of co-accused, petitioner has been shown as accused in some prohibition cases. It is further contended that since the first informant of FIR being C.R.No.I-222 of 1999 registered with Sarkhej Police Station is a friend of the respondent No.3, the respondent No.3 is taking revenge and hence, he is harassing the petitioner. According to him, since the petitioner was not dealing in manufacturing, storing, transporting, importing, exporting, selling or distributing any liquor or intoxicating drug, order is bad and requires to be quashed. In view of the judgment of the Apex Court in Additional secretary to the Govt. of India Vs. Alka Subhash Gadia, 1992 Supp(1) SCC 496, it was submitted that this Court has jurisdiction to entertain the present petition at the pre-execution stage.

5. In the affidavit-in-reply filed on behalf of the respondent No.2, it is inter alia contended that the petition is premature at the pre-execution stage and since the petitioner is hiding himself at unknown place conveniently avoiding the service of the detention order, order of detention dated 3-8-2001 could not be served on him. In respect of the judgment reported in Judgment Today 1991(1) S.C. 459, it is submitted that Supreme Court has carved out five categories for entertaining petition at pre-execution stage under Article 226 of the Constitution of India and it has to be exercised sparingly. It was further contended tht since the case of the present petitioner does not fall under any of the five categories, he may not be given the benefit. According to him, the decision of Alka has been followed by the Supreme Court in the case of M.K.Bapna reported in

JT 92(4) S.C. p.46. Relying upon a decision of a Division Bench of this Court reported in 28(2) GLR page 1345, it is contended that once the order not having been served, detaining authority cannot be compelled to disclose the grounds of detention and this view has been taken by the Apex Court in Alka Gadia case. It is further contended that petition of the detenu would be heard at pre-execution stage only after the detenu is surrendered to custody and in this connection, reliance was placed on a decision of a Division Bench of this Court rendered in case of Ilesh N. Patel Vs. Commissioner of Police, 97(2) GLR page 1062. It is further contended that order of detention was passed against the petitioner taking into consideration the cases registered against him and since he was not available at his residence, order of detention could not be served on him, but was pasted at his residence. It is submitted that since the petitioner was not available, he was declared as absconder vide notification dated 10-12-2001 by the Commissioner of Police copy of which was affixed at the residence of the petitioner. Regarding the averments of C.R.No.I-22 of 1999 registered at Sarkhej Police Station against the petitioner, it was contended that it has no nexus with the order of detention dated 3-8-2001 and hence, said averments were denied. It was further submitted that the petition be dismissed in limine with costs.

6. Heard Mr.Y.S.Lakhani for Mr.R.J.Goswami, learned counsel for the petitioner and Mr.S.J.Dave, learned AGP for the State.

7. The learned counsel for the parties have argued the same which they have contended in their respective pleadings and short narration of the same has been stated by me here in this order and, therefore, it is not necessary to repeat the same at this stage. Both the counsels have relied upon 1992 Supp.(1) SCC 496 in the case of Addl. Secretary to the Govt. of India Vs. Alka Subhash Gadia. They have also relied upon (2000) 8 SCC page 630 in the case of Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others, AIR 2001 SCW 463 in the case of Union of India and others Vs. Muneesh Suneja as well as a Full Bench judgment delivered by this Court in the case of Vedprakash Devkinandan Chiripal Vs. State of Gujarat and another, 1987 (2) GLR page No.1345.

8. It is true that though the parties have relied upon various reported judgments, the law on the point is very settled in Alka Gadia's case and if the case of the petitioner is falling under any of the five exceptions

carved out in the aforesaid case, then only petitioner will be entitled to the benefit at a pre-detention stage. This view has been reiterated in the case reported in 2000(8) SCC p.630. The Apex Court has held in para 6 of the above reported judgement as under:

"This Court in Alka Subhash Gadia case was also concerned with a matter where the detention order had not been served but the High Court had entertained the petition under Article 226 of the Constitution. This Court held that equitable jurisdiction under Article 226 and Article 32 which is discretionary in nature would not be exercised in a case where the proposed detenu successfully evades the service of the order. The Court, however, noted that the courts have the necessary power in appropriate cases to interfere with the detention order at the pre-execution stage but the scope for interference is very limited. It was held that the courts will interfere at the pre-execution stage with the detention orders only after they are prima facie satisfied-

(i) that the impugned order is not passed under the Act under which it is purported to have been passed,

(ii) that it is sought to be executed against a wrong person,

(iii) that it is passed for a wrong purpose,

(iv) that it is passed on vague, extraneous and irrelevant grounds, or

(v) that the authority which passed it had no authority to do so."

Again same view has been taken by the Apex Court in the case reported in 2001 AIR SCW p.463. It has been held in this reported case at head note `B' as under:

"(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S.3-- Preventive detention--Interference by court at pre-detention stages--Not permissible except in certain circumstances--Quashing of order of detention on ground of mere delay in passing order or

execution thereof--Illegal."

In this reported judgment also, the five exceptions as mentioned in Alka Gadia's case has been reproduced. Therefore, it has been a consistent view of the Apex Court that in the matter of pre-detention filed under Article 226 of the Constitution, interference is not permissible and has been held to be illegal. It was also held that the scope of interfrence is very limited in such cases. Keeping in mind the principles laid down by the Apex Court in the aforesaid reported cases, I proceed further.

9. It is vehemently argued by the learned counsel for the petitioner that that time and again various detention orders were being passed against the petitioner out of which, some have been quashed by this Court and one has been revoked by the authority and, therefore, present order of detention purported to have been passed against the petitioner is with mala fide intention and with ulterior motive. It is further contended that the alleged order of detention has not been served on the petitioner though he was available, but it has been affixed at the house of the petitioner and, therefore, there is an inordinate delay on the part of the authority in executing the same and on this ground also, the impugned order of detention may be quashed and set aside. According to learned counsel for the petitioner, case of the petitioner falls under the exceptions carved out in Alka Gadia's case.

10. It is to be borne in mind at this stage that the impugned order of detention is not produced on record and hence, whatever the arguments that have been advanced by the learned counsel for the petitioner is based on assumption. The otherside cannot be justified at this stage unless the grounds of detention are available to the parties and, therefore, the authority has rightly denied the allegation made by the petitioner on the basis of presumption in his affidavit and once it is denied, it is a sufficient exercise done by the authority and if one wants to go further, the only remedy available is to go for execution of the order.

11. Law on this point has been settled in the case of Alka Gadia (supra). It has been observed in para 30 of Alka Gadia's case by the Apex Court as under:

"The powers under Articles 226 and 32 are wide and are untrammeled by any external restrictions

> and can reach any executive order resulting in civil or criminal consequences. however, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so, in the interest of the administration of justice and for better and more efficient and informed exercise of the said powers. These self imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self evolved judicial policy and in conformity with the self imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available."

12. So, at the pre-execution stage, Court should interfere only if any exceptional circumstance has been shown. According to me, case of the petitioner does not fall under any of the five exceptions laid down in Alka Gadia's case. Therefore, the facts mentioned in the petition and denied the same by way of affidavit are required to be dealt with after execution of the detention order on the petitioner and after giving proper opportunity to the parties concerned.

13. It is required to be noted that the order of detention has not been executed in this case. According to petitioner, though he was available at his residence and also at other regular places, impugned order was not served on him. In this connection, it may be stated that merely the petitioner is marking his presence once or twice in a remand case in the Court at Ahmedabad (Rural) cannot be said that he was available and deliberately order has not been executed upon him and hence, it cannot be said that there is inordinate delay in executing the detention order. It is clearly established that petitioner was not available and hence, order of detention could not be executed.

14. As regards the contention raised by the learned

counsel for the petitioner regarding mala fide intention of the authority in issuing the detention order, without entering into the merits and demerits of the above referred cases and without giving any opportunity of explaining to the otherside and without going into the grounds of detention, this Court cannot come to any final conclusion that the order in question has been issued with mala fide intention at this stage.

15. Having regard to the above facts and circumstances, I am of the opinion that case of the present petitioner does not come under any of the five categories stated in the case of Alka Gadia's case (supra) and hence, the present petition is required to be rejected.

16. This Special Civil Application is hereby rejected. Notice is discharged.

(R.P.DHOLAKIA, J.)
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